88-351

Supreme Court, U.S.
FILED
AUG 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

PETITION FOR A WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD DRINKWATER, Petitioner

v.

METROPOLITAN LIFE INSURANCE CO.,
Respondent

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August 15, 1988

QUESTIONS PRESENTED

1. Are the equitable remedies provided by 29 U.S.C. § 1132(a)(3)(B) for breach of fiduciary duty by an ERISA fiduciary to a plan participant co-extensive and analogous to the equitable remedies for the breach of the fiduciary duty of fair representation by a union to a member as developed in the federal common law pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a)?

2. Are the same equitable remedies provided for interference with a plan participant's protected rights by an employer 29 U.S.C. § 1140, co-extensive and analogous to the equitable remedies developed in the federal common law for analogous misconduct by an employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a)?

3. Can extracontractual damages be imposed against the ERISA fiduciary and the employer respectively under 29 U.S.C. §§ 1104 and 1140 for outrageous, malicious and bad faith interference with the vesting of a plan participant's pension rights?

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Congress intended that the equitable remedies for ERISA violations conform to the remedies created in the federal common law for analogous violations of the Labor Management Relations Act and not under ERISA be limited to injunctive or declaratory relief.

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Extracontractual damages are provided under ERISA 29 U.S.C. sections 1101 et seq. for outrageous, malicious and bad faith interference with the protective rights of a plan participant.

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LIST OF PARTIES

The parties to the proceedings below are the petitioners Richard Drinkwater and Judith Drinkwater and the respondent Metropolitan Life Insurance Co.

Judith Drinkwater does not appear as a petitioner before this court.

TABLE OF AUTHORITIES

Baskin v. Hawley 807 F.2d 1120 (2nd Cir. 1986)

Bloom v. International Brotherhood of Teamsters Local 468 752 F.2d 1312 (9th Cir. 1984)

Bowen vs. United Postal Service 470 F.Supp. 1127 (D. Va. 1979)

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)

Crawford v. Pittsburg-Des Moines Steel Co. 386 F.Supp.290 (D. Wyo. 1974)

De Arroyo v. Sindicato de Irabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970)

DelCostello v. International Brotherhood of Teamsters, Chauffeurs, 510 F. Supp. 716 (D. Md. 1981)

Eastern District Council v. Blake Construction Co., 457 F. Supp 825 (D. Va. 1978)

Farmer vs. ARA Services, Inc. 660 F.2d 1096 (6th Cir. 1981)

Holodnak vs. Avoc, Corp., Avco-Lycoming Div. 514 F.2d 285 (2nd Cir. 1975)

International Union, United Auto v. Federal Forge, Inc., 583 F. Supp. 1350 (D. Mich. 1984)

Jones v. Trans World Airlines, Inc. 495 F. 2d 790 (2nd.Cir. 1974)

Mssachusetts Mutual Life Insurance Co. v. Russell 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed, 2d 96 (1985)

Metropolitan Life Insurance Co. v. Taylor, _____U.S._____, 107 S. Ct. 1542, 95 L.Ed 2d 55 (1987)

Patrick v. I.D. Packing Co., 308 F. Supp. 821 (D.Iowa 1969)

Pilot Life Insurance Co. v. Dedeaux _____U.S._____, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)

Refino v. Feuer Transp., Inc. 480 F.Supp. 562(D. N.Y. 1979) aff'd. 633 F.2d 205 (2nd Cir. 1979)

Richardson v. Communications Workers of America 443 F.2d 974 (8th Cir. 1971)

Soto Segarra v. Sea-Land Service, Inc. 581 F.2d 291 (1st Cir. 1978)

Textile Workers v. Lincoln Mills of Alabama 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957)

Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed. 2d 842 (1967)

Zamora v. Massey-Ferguson, Inc. 336 F. Supp. 588 (D. Iowa 1972)

STATUTES

Federal Rules of Civil Procedure
12(b)(6)

Labor Management Relations Action § 301;
29 U.S.C. § 185(a)

Employee Retirement Income Security Act
(ERISA)

29 U.S.C. §§ 1101, et seq.

29 U.S.C. § 1104(a)

29 U.S.C. § 1113(a)(2)

29 U.S.C. § 1132(a)(3)(B)

29 U.S.C. § 1140

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

RICHARD DRINKWATER, Petitioner

v.

METROPOLITAN LIFE INSURANCE CO.,
Respondents

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Richard Drinkwater respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on May 18, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported in Drinkwater v. Metropolitan Life Insurance Company at 846 F.2d, 821 and is reprinted

in the appendix hereto, pp. A1-A25, infra.

The memorandum decisions of the United States District Court for the District of Massachusetts (Young, J.) have not been reported. They are reprinted in the appendix hereto, pp. A26-A30, infra.

JURISDICTION

Petitioner brought this suit in 1985 in the District of Massachusetts, invoking the federal question jurisdiction of the District Court under the Employee Retirement Income Security Act ("ERISA", 29 U.S.C. § 1101 et seq. On June 2, 1987, the District Court granted the respondent's motion for summary judgment. See pp. A26-A30, infra.

Petitioner appealed to the U.S. Court of Appeals for the First Circuit and on May 18, 1988 the First Circuit entered a judgment and opinion affirming the

granting of summary judgment on the grounds that extracontractual damages could not be recovered under 29 U.S.C. § 1132(a)(3)(B), as such damages were not the "other appropriate relief" authorized by that section. See pp. A33-A38, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The U.S. Congress enacted ERISA (29 U.S.C. 1101, et seq.) to provide comprehensive federal regulation of the administration of employee benefit plans; to provide uniform standards for the administration of employee benefit plans, and to vest the federal courts with exclusive jurisdiction to provide statutory and judicial remedies.

29 U.S.C. § 1132, pp. A33-A38 infra, is the civil enforcement provision, granting federal courts jurisdiction, in separate and distinct sections 1) to grant judgment for benefits due 2) to issue injunctions, and in addition, to grant "other appropriate equitable relief to redress such violations or to enforce any provisions" of ERISA.

29 U.S.C. § 1104(a), pp. A31-A32 infra, mandates that a fiduciary shall act solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries.

29 U.S.C. § 1140, p. A39 infra, prohibits "any person" from interfering with the attainment or exercise of an ERISA guaranteed right of discharge, fine, suspension, expulsion, discipline or discrimination.

STATEMENT OF THE CASE

Petitioner was a life insurance salesman for respondent Metropolitan Life Insurance Company ("Metropolitan") for over a period of thirty years. On October 12, 1975 he suffered a heart attack causing disability. Metropolitan had one disability benefit plan in effect in 1975 (the "T & P Plan") and another with more generous benefits took effect on January 1, 1976 (the "L.T.D. Plan"). In October 1976 Metropolitan determined petitioner's status to be permanently disabled, but because the date of onset of the disabling condition was 1975, awarded him only the lesser disability benefits under the "T & P Plan" in effect in 1975.

Petitioner continued to receive disability benefits under the old "T & P Plan" from 1976-82, with his treating cardiologist making yearly reports of his

continuing disability from chronic heart disease to his employer/fiduciary, Metropolitan. The disability benefit plans, both ERISA-qualified, were funded and administered by Metropolitan itself. In July 1982, however, Metropolitan requested that petitioner submit to medical exams by its own doctors to confirm his disability. Drinkwater complied, but the first exam was inconclusive. The second exam produced a warning that Drinkwater not be ordered to return to work without the approval of his treating cardiologist. The psychiatrist who conducted the second exam warned Metropolitan in writing that the stress of an insurance salesman's job was beyond petitioner's emotional capacity, and that before returning to work petitioner should receive a vocational evaluation to determine what other sort of work, if any,

petitioner was capable of performing.

By letter of April 8, 1983 Metropolitan terminated petitioner's disability benefits effective April 30, 1983. Upon contacting a regional officer of Metropolitan, petitioner was orally advised that if he did not return to work on May 2, 1983, the first regular work day after April 20, "that he would be fired, with total forfeiture of all retirement, health and other employee benefits."

Having thus been deprived of disability benefits despite the opinion of his treating cardiologist that his disability continued, and facing discharge and loss of all other employee benefits, petitioner returned to work on May 2, 1983 as ordered. Within a few hours he suffered a heart attack at work.

Metropolitan then restored disability benefits, but treating the May 2, 1983

heart attack as a symptom of a pre-existing and continuing heart condition, paid benefits under the old "T & P Plan" rather than the "L.T.D. Plan".

Within two or three years from these events, petitioner's retirement benefits would have vested absolutely. Metropolitan subsequently granted petitioner retirement benefits in the fall of 1985.

The original complaint urged three distinct violations of ERISA. Count I alleged the breach of Metropolitan's duty as employer under § 1140 of ERISA by the constructive discharge and interference with protected rights of petitioner. Count I alleged conjunctively the breach of Metropolitan's fiduciary duty as plan administrator under § 1104 of ERISA. Count II alleged violation of Metropolitan's fiduciary duty by

misrepresentation to petitioner of his eligibility for disability benefits under the new "L.T.D. Plan". Count III alleged violation of §§ 1104 and 1140 by Metropolitan to petitioner's wife, Judith Drinkwater.

Count I of the original complaint prayed for compensatory damages for physical, mental and emotional suffering, punitive damages and attorney's fees. Count II asked for contractual damages for lost benefits, punitive damages and attorney's fees. Count III asked for compensatory damages for loss of consortium and attorney fees.

Metropolitan moved to dismiss the entire complaint pursuant to Fed.R.Civ. P.12(b)(6) for failure to state a claim upon which relief can be granted. Respondent grounded the motion in the claim that ERISA does not authorize

judicial remedies for extracontractual damages, either compensatory or punitive. Respondent moved to dismiss Count II on the additional grounds that it was time-barred under the statute of limitations of 29 U.S.C. § 1113(a)(2).

The trial court dismissed Count III on the grounds that damages for loss of consortium are not recoverable under ERISA. It further upheld the defendant's plea of prescription as to Count II and dismissed that Count as well. The court ruled that punitive damages are not authorized by ERISA, but denied the motion to dismiss Count I on the grounds that the law was unsettled as to whether extracontractual compensatory damages were allowed for the ERISA violations alleged in Count I. The court reserved its ruling until trial on the merits.

On July 9, 1986 the plaintiffs

amended their original complaint to allege new causes of action as to counts II and III. Count II alleged that on May 2, 1983 when petitioner returned to full time employment he qualified for coverage under the L.T.D. Plan which took effect in 1976, and asked for damages of $95,000.00 in lost benefits representing the difference in benefits payable between the L.T.D. Plan and the T & P Plan, prospectively from May 2, 1983. Count II also asked for compensatory damages. Count III of the amended complaint invoked the court's diversity jurisdiction to alleged a state cause of action for intentional infliction of emotional distress on Judith Drinkwater.

Metropolitan moved for summary judgment. Relying expressly upon the authority of Pilot Life Insurance Co. v. Dedeaux, _____U.S._____, 107 S.Ct. 1549,

95 L.Ed. 2d 39 (1987) and Metropolitan Life Insurance Co. v. Taylor, _____U.S._____, 107 S.Ct. 1542, 95 L.Ed 2d 55 (1987), the trial court ruled that the extracontractual damages claimed by Count I and Count II were not authorized by ERISA and that the state cause of action urged by petitioner's wife was preempted by ERISA and unauthorized by the controlling statutory scheme. The court further ruled that the claim for past due benefits presented by the amended Count II was barred by petitioner's failure to exhaust administrative remedies. Accordingly, the trial court granted the defendant's motion for summary judgment as to all three counts of the amended complaint.

From this judgment petitioner and his wife appealed to the U.S. Court of Appeal for the First Circuit. The First Circuit

affirmed the judgment of the trial court. The First Circuit held that the extra-contractual damages sought by petitioner were not recoverable under ERISA - that the pertinent enforcement provision of § 1132(a)(3)(B) of ERISA, "other appropriate equitable relief" authorized only declaratory or injunctive relief, but not compensatory and punitive damages. Not even the most outrageous misconduct in violation of ERISA duties and prohibitions justified an award of damages other than benefits under the First Circuit's rationale of the statute.

The First Circuit further affirmed the summary judgment on Count II because of petitioner's failure to exhaust administrative remedies. While overruling the trial court's conclusion that Judith Drinkwater's state cause of action in Count III was preempted by ERISA, the

First Circuit held that Count III failed to state a cause of action under applicable Massachusetts law, and also affirmed the summary judgment as to Count III.

Petitioner now brings only Count I before this court for judicial review; Counts II and III are abandoned.

REASONS FOR GRANTING WRIT

Congress intended that the equitable remedies for ERISA violations conform to the remedies created in the federal common law for analogous violations of the Labor Management Relations Act.

The crux of this application is whetner 29 U.S.C. 1132 (a)(3)(B) authorizes judicially implied private remedies for ERISA violations in the same manner that the federal courts have fashioned analogous judicially implied

remedies for analogous violations of the substantive norms of the Labor Management Relations Act, 29 U.S.C. § 185(a). Under the four-factor analysis of Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the issue of the scope of remedial authority granted the federal courts of § 1132 is first, a question of the legislative intent to create such a remedy and secondly, whether such a remedy is consistent with the statutory structure and its underlying purpose?

This honorable court has never decided an ERISA case on the narrow grounds of whether ERISA authorizes a private judicial remedy for compensatory and punitive damages for a beneficiary on the same criteria that such damages may be awarded as implied private causes of action arising under the LMRA. There has been only one decision of this Court to

apply the Cort v. Ash formula to decide whether ERISA implies private remedies, Massachusetts Life Insurance Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), but Russell was limited to the ruling that the employee benefit plan was the only judgment creditor for the remedy created by 29 U.S.C. 1101 et seq. creditor for the remedy created by 29 U.S.C. § 1109 for breach of fiduciary duty, and that accordingly an individual beneficiary or participant had no right of action under § 1109 for extra-contractual damages. The court expressly reserved the question of whether the employee benefit plan could recover extracontractual damages, 105 S.Ct. at 3092, n.12, and also reserved the question of "whether any other provision of ERISA authorizes recovery of extracontractual damages", 105 S. Ct. at 3089, n.5. However, the Russell

case and other decisions of the court interpreting the scope and effect of the preemption clause of ERISA support the argument of petitioner that it was the legislative intent of Congress and consistent with the statutory structure that the equitable relief authorized by § 1132 should include similar remedies as those implied by the federal courts under the LMRA. Pilot Life Insurance Co. v. Dedeaux, U.S. 107 S.Ct. 1549, 95 L.Ed.2d 30 (1987); Metropolitan Life Insurance Company v. Taylor, U.S. 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

Petitioner's argument in the Court of Appeals was that Metropolitan's termination of petitioner's disability benefits, effectively forcing him to either return to work or forfeit all employee benefits because of resignation or dismissal, which was contrary to the

medical advice of both petitioner's treating physician and the Metropolitan physician and misrepresented to petitioner by Metropolitan, was outrageous misconduct, causing severe emotional distress manifested by the physical injury of a myocardial infarction. Metropolitan acted in a dual capacity in causing this injury; as a fiduciary/administrator in fraudulently misrepresenting the medical experts' opinions and in threatening termination of the benefits; as employer in ordering petitioner to return to work disabled and advising him that the would be fired if he didn't. Metropolitan's intent in each capacity was to coerce petitioner's resignation or dismissal due to his medical inability to work, and thereby save money under the Metropolitan funded plan through the prospective forfeiture of all employee benefits

including retirement.

In Russell (concurring opinion by Brennan, J.) and Pilot Life and Taylor (O'Connor, J.) different members of the Court analyzed the scope of remedial relief and of the preemption clause of ERISA, respectively, using analogous provisions of the Labor Management Relations Act as the ground for the Legislative intent for the application of similar provisions of ERISA. In these decisions the Court cites and discusses extensively from the legislative record the intent of the legislators that the federal courts would fashion a body of federal law to enforce the rights of ERISA beneficiaries in a similar manner to those brought under § 301 of the Labor Management Relations Act.

The fiduciary duty of a union to fairly represent its members in a

bargaining unit is contractually grounded, yet is incorporated into the statutory duty of fair representation created by the LMRA. This fiduciary duty is analogous to the fiduciary duty of the plan administrator of an employee benefit plan to act in the best interests of the beneficiaries and participants in the plan which is also contractually grounded, yet incorporated into the statutory duty of 29 U.S.C. § 1104(a). Violation of § 1140, while creating independent liability under ERISA, may also constitute a violation of the fiduciary duty of § 1104 if the employer a fiduciary/administrator be identical, as in the case at bar.

The union's duty of fair representation under the LMRA has been interpreted by this Court to be fiduciary in nature, and its arbitrary, discriminatory or bad faith violation by

the union fiduciary held to give rise to a cause of action for damages in contract or in equity. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The Court had previously elucidated the process for formulating a federal substantive law to govern implied judicial remedies in the LMRA, including private causes of action for damages in equity, in Textile Workers vs. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, L.Ed.2d 972 (1957).

Governed by these cases, extracontractual damages for emotional distress have been awarded by the federal courts in cases arising under the LMRA for breaches of the fidicuary duty of fair representation. Baskin v. Hawley, 807 F.2d 1120 (2nd Cir. 1986); Bloom v. International Brotherhood of Teamsters Local 468, 752 F.2d 1312 (9th Cir. 1984);

Farmer v. ARA Services Inc., 660 F. 2d 1096 (6th Cir. 1981); Richardson v. Communications Workers of America, 443 F.2d 974 (8th Cir. 1971); Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2nd Cir. 1974); International Union, United Auto v. Federal Forge, Inc., 583 F.Supp. 1350 (D.Mich. 1974).

Other cases require, as is present in the case at bar, that the emotional distress be accompanied by physical injury. Soto Segarro v. Sea-Land Service, Inc., 581 F.2d 291 (1st Cir. 1978); DeArroyo v. Sindicato de Irabajadores Packinghouse, 425 F. 2d 281 (1st Cir. 1970).

Reasoning analogously from the implied judicial remedies developed in the federal common law to redress violations of the duty of fair representation under the LMRA, which the legislative history of

ERISA indicates that Congress intended the federal courts to utilize to implement the legislative policies of ERISA, the "other appropriate equitable relief" provision of § 1132(a)(3)(B) of ERISA clearly authorizes implied judicial remedies of damages for physical, emotional and mental suffering caused by an ERISA plan administrator's intentional breach of his fidicuary duty by outrageous misconduct.

§ 1140 of ERISA does not regulate a contractual relationship; it imposes sanctions upon "any person", including an employer, who interferes with ERISA protected rights, or the attainment of prospective ERISA rights. The legislative history of this section make clear that Congress intended that § 1140 would apply to acts of constructive discharge or attempted constructive discharge.

The wrong prescribed here is in the

nature of a tort rather than a contract. If there be no contract, there can be no contractual damages; yet Congress clearly intended a judicial remedy for violation of § 1140, and just as clearly this remedy was intended to be extracontractual in nature and to be fashioned by the federal courts as part of a substantive federal common law effectuating the substantive rights conferred by ERISA. § 1140 provides a second ground for compensatory extracontractual damages for petitioner's injuries.

The compensatory damages for Count I should be assessed proportionately between Metropolitan as fiduciary and as employer, according to the proportion its conduct in each capacity caused the injury suffered by petitioner. Vaca v. Sipes, 386 U.S. 171, 197, 87 S.Ct. 903, 920 17 L.Ed.2d 842 (1967).

Petitioner also claimed punitive damages against Metropolitan as employer for breach of § 1140. This court has never interpreted § 1140. Punitive damages have been awarded employees against employers who abrogated or interfered with the contractual rights of the employee. The principle that the LMRA creates an implied judicial remedy against the employer for punitive damages is well-settled in federal law. Holodnak v. Avoc Corp., Avco-Lycoming Div., 514 F.2d 285 (2nd Cir. 1975); Bowen v. United States Postal Service, 470 F. Supp. 1127 (D.Va. 1979); Refino v. Feuer Trans. Inc., 480 F.Supp. 562 (D.NY 1979) aff.d. 633 F.2d 205 (2nd Cir. 1979); Eastern District Council v. Blake Constr. Co., 457 F. Supp. 825 (D.Va. 1978); Del Costello v. International Brotherhood of Teamsters, Chauffeurs, 510 F. Supp. 716 (D.Md. 1981);

Patrick v. I. D. Packing Co., 308 F.Supp. 821 (D.Iowa 1969); Zamora v. Massey-Ferguson, Inc., 336 F.Supp. 588 (D.Iowa 1972); Crawford v. Pittsburgh-Des Moines Steel Co., 386 F.Supp. 290 (D.Wyo. 1974).

As with the compensatory damages claimed for violation of § 1104 and § 1140, petitioner claims punitive damages against Metropolitan under § 1140 for extraordinary and outrageous misconduct. Petitioner did not argue below in the Court of Appeal nor does he to this Court that every breach of fiduciary duty and every interference with protected rights causing emotional and physical injury should give rise to an implied judicial remedy of damages. The implied remedies developed by the federal courts pursuant to § 301 of the LMRA have not been expansive in scope, nor does petitioner

suggest that the Court recognize implied remedies in ERISA of a similarly expansive scope. Petitioner has only argued that such remedies may be implied from ERISA where there is present outrageous and exceptional misconduct such as that of Metropolitan in the case at bar.

This discussion of the interrelationship of the LMRA and ERISA addresses both facts of the Cort v. Ash analysis and also elucidates the error of the judgment of the Court of Appeal. If ERSIA is to be interpreted analogously with the LMRA as implied by the Court in Pilot Life and Taylor, and argued by the concurring opinion in Russell, then the Court of Appeal erred in interpreting "other appropriate equitable relief" in § 1132(a)(3)(B) to not authorize implied judicial equitable remedies for outrageous violations of ERISA statutory norms. The

dicta in those decisions state a strong case that the creation of a federal common law of private remedies for ERISA violations by analogous interpretation and applicaton of the remedies developed under the LMRA was in fact the legislative intent of Congress in enacting ERISA in 1974. The conclusion of the Court of Appeal that "other appropriate equitable relief was intended to be limited to declaratory and injunctive relief would be delegitimated by such a finding of legislative intent, as implied remedies for extracontractual damages, both compensatory and punitive, are well established in the jurisprudence interpreting the LMRA.

Finally, the Court of Appeals' interpretation is inconsistent with the remedial statutory structure. § 1132 contains specific provisions for

declaratory and injunctive relief. Why would Congress grant additional remedial authority to the federal courts, with the emphasis on "other appropriate equitable relief," if in fact it intended that phrase to be redundant, to authorize nothing more than the declaratory and injunctive relief already specifically provided for? The word "other" gives the provision a meaning more consistent with the creation of implied remedies analogous to those created by the courts under the LMRA.

CONCLUSION

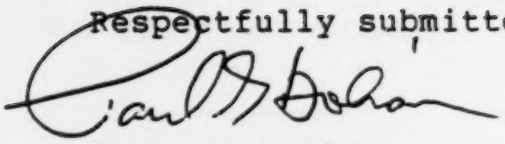
For these reasons, this petition for certiorari should be granted. The First Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court.

The judidical remedies to be implied for violations of ERISA are to be analogously appropriated from those developed by the federal court in the substantive common law arising under § 301 of the LMRA for analogous violations of that statute.

Compensatory damages for physical, emotional and mental suffering are therefore recoverable under both statutes against fiduciaries for extreme, exceptional or outrageous breaches of fiduciary duty.

Punitive damages are therefore recoverable against an employer under both statutes for similar outrageous misconduct by the employer.

Respectfully submitted,



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August 15, 1988

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1533

RICHARD DRINKWATER, et al.,
Plaintiffs, Appellants,

v.

METROPOLITAN LIFE INSURANCE CO.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Coffin, Circuit Judge,
Brown,* Senior Circuit Judge,
and Torruella, Circuit Judge.

Paul G. Holian with whom Charles J. Yeager was on brief for appellants.
William J. Toppeta with whom James M. Lenaghan and David J. Larkin, Jr., were on brief for appellee.

MAY 18, 1988

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* Of the Fifth Circuit, sitting by designation.

JOHN R. BROWN, Circuit Judge.

This is an appeal from a summary judgment rendered in favor of Metropolitan Life Insurance Co. (Metropolitan) and against the Drinkwaters, Richard and Judith, on claims arising out of Richard Drinkwater's entitlement to disability benefits under a qualified ERISA-plan. Count I, seeking compensatory and punitive damages for breach of fiduciary duty, was properly dismissed as an extra-contractual claim not authorized by ERISA. Count II, seeking compensatory damages for the difference between what Drinkwater received and what he claims he should have received, was properly dismissed for failure to exhaust administrative remedies. Count III, brought by Judith Drinkwater as a pendent state law claim, was improperly dismissed on preemption grounds. Nonetheless, we affirm the grant of summary

judgment on this claim because, under Massachusetts law, Judith Drinkwater has failed to state a claim upon which relief can be granted.

METROPOLITAN IN THE THICK OF THINGS-- EMPLOYER OR ERISA-INSURER

This case presents Metropolitan in the somewhat unusual posture of both employer and ERISA-insurer. Richard Drinkwater had worked for Metropolitan for over thirty years as an insurance salesman when, on October 12, 1975, he suffered a heart attack. Metropolitan placed him on temporary disability status immediately, and began paying temporary disability insurance benefits to him the following week. His condition persisted. At the expiration of the one-year period covered by Metropolitan's temporary disability plan, Drinkwater was placed on permanent

disability status under the plan then in effect (the "old plan"), and Metropolitan commenced paying those benefits to him in October 1976.

Metropolitan developed a new and more generous permanent disability plan which became effective January 1, 1976 (the "new plan"). Drinkwater claims he was informed by a representative of Metropolitan that he would be eligible for the higher benefits available under the new plan. Nonetheless, when Drinkwater was placed on permanent disability in October 1976, he received benefits under the old plan.

METROPOLITAN HAS DOUBTS

From July 1976 to July 1982, Metropolitan paid benefits to Drinkwater under the terms of the old plan. So far as we have been able to determine, at no time during that six year period did Drinkwater

contest the payment of benefits under the old plan. In July 1982, Metropolitan requested that Drinkwater submit to a medical examination to be performed by Metropolitan's own doctors.

Two physicians examined Drinkwater at that time. The first, Dr. Goldman, stated that he found "no objective data to corroborate" Drinkwater's statements that he had been diagnosed as having coronary artery disease.[1] Subsequently, Dr. Zager, a psychiatrist, examined Drinkwater[2] and concluded that (i) Drinkwater should not be ordered to return to work without first checking with his cardiologist; (ii) the stress of an insurance salesman's job was

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[1]In the same letter, however, Goldman stated that he had been unable to obtain Drinkwater's medical records from Massachusetts General Hospital, and consequently was unable to make a definite diagnosis.

[2]Also without benefit of the medical records.

beyond Drinkwater's emotional capacity; and (iii) Drinkwater should receive a vocational evaluation to determine what other sort of work, if any, Drinkwater was capable of performing.

METROPOLITAN DETERMINES TO TERMINATE

By letter of April 8, 1983 Metropolitan, based on the reports of Drs. Goldman and Zager, advised Drinkwater that his disability status had been re-evaluated. Because "the independent medical examiners failed to find objective evidence" of his disability, Drinkwater's benefits would not be continued beyond April 30, 1983. The letter concluded with a "suggestion" that Drinkwater contact Metropolitan's regional sales manager "to discuss ... future plans and employment status."

On April 25, 1983, Drinkwater contacted Metropolitan and was advised that he would send information to refute Metropolitan's determination that he was no longer eligible for permanent disability benefits. Drinkwater supplied no additional information to Metropolitan, and did not request a review of the determination to discontinue his disability benefits. He contends, however, that he was orally advised by unspecified officers of Metropolitan that "if he did not return to work on May 2, 1983, as directed, that he would be fired ... with total forfeiture of all retirement, health, and other employee benefits."

MAY 2, 1983--AN EVENTFUL DAY

Drinkwater did return to work on May 2, 1983, and suffered a second heart attack that very same day. Following that heart

attack, Metropolitan restored Drinkwater's disability benefits, under the terms of the old plan, pursuant to the "recurrence of disability" provision of that plan. Under Metropolitan's interpretation of the plan, this second heart attack was a recurrence of a condition which manifested itself prior to January 1, 1976. As a recurrence of a preexisting condition, Drinkwater was only entitled to benefits available at the time this condition first was manifested, benefits under the old plan. Drinkwater took early retirement effective October 1, 1985, and Metropolitan, as employer, not ERISA insurer, began paying Drinkwater retirement benefits.[3]

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[3]Drinkwater's retirement benefits are uncontested. There is no indication whether they were ERISA-governed or part of a separate employment agreement.

LITIGATION SETS IN

Drinkwater and his wife Judith filed their original complaint in the District Court on December 4, 1985, asserting claims under various provisions of ERISA as the sole basis for federal jurisdiction. Count I claimed compensatory and punitive damages pursuant to 29 U.S.C. § 1132(a)(3)[4] for

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[4] 29 U.S.C. § 1132 provides in part:

(a) A civil action may be brought --

(1) by a participant or beneficiary --

...

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act of practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such

breach of fiduciary duty to Drinkwater imposed by 29 U.S.C. §§ 1104 and 1140 (ERISA §§ 404 and 510), in that Metropolitan's acts constituted attempted interference with Drinkwater's "attainment of his vested right to retirement." Compensatory damages were sought in the amount of $5 million, punitive damages in the amount of $10 million and attorney's fees.

Count II sought compensatory damages pursuant to 29 U.S.C. § 1132(a)(3) equal to the difference in the disability benefit payments payable under the new plan, and those actually paid to Drinkwater after May 2, 1983, which were calculated on the basis

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violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

of the old plan,[5] a total of $300,000. He also sought punitive damages in the amount of $2 million, plus attorney's fees.

In Count III, Judith Drinkwater, in a pendent state law claim, sought compensatory damages under Massachusetts state law for her emotional distress because her husband was forced to return to work under circumstances that made it dangerous to his physical and mental health for him to do so. She sought $500,000, plus attorney's fees.

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[5]Drinkwater does not contest the payments made under the old plan prior to May 2, 1983. He apparently accepts the determination by Metropolitan that the benefits to which he was entitled throughout his initial disability were properly calculated under the old plan. He claims, however, that his return to work after termination of his initial disability vested his rights to benefits under the new plan, regardless of whether the heart attack suffered on May 2, 1983 was a continuation of his previous disability.

METROPOLITAN THE VICTOR

Thereafter the District Court granted summary judgment for Metropolitan on all three claims, ruling that (i) on the basis of Pilot Life v. Dedeaux[6] and Metropolitan Life v. Taylor,[7] ERISA excluded the extra-contractual remedies sought in the first claim; (ii) exhaustion of administrative remedies was required but not satisfied for the relief requested in Count II; and (iii) the state law claim in Count III was preempted by ERISA as interpreted in Dedeaux and Taylor.

From that judgment, the Drinkwaters appeal.

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[6]Pilot Life Ins. Co. v. Dedeaux, ___ U.S. ___, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

[7]Metropolitan Life Ins. Co. v. Taylor, ___ U.S. ___, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

I. EXTRA-CONTRACTUAL DAMAGES

The compensatory and punitive damages sought by Richard Drinkwater are extra-contractual in that his relief is not within the terms of Metropolitan's ERISA-governed benefit plan. Richard Drinkwater has asserted his entitlement to relief based on Metropolitan's bad faith and malicious conduct in misrepresenting benefits due Drinkwater and in attempting to constructively discharge him, all in violation of Metropolitan's fiduciary duty under ERISA. The Drinkwaters concede that the extra-contractual damages they seek are not expressly authorized by ERISA,[8] and consequently contend that these damages

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[8]While breach of fiduciary duty is a recognized statutory violation under 29 U.S.C. § 1104, the extra-contractual damages sought by Drinkwater are not authorized by ERISA in favor of plan beneficiaries. See Massachusetts Life Ins. Co., v. Russell, n.11, infra.

come within the statutory grant of "other appropriate equitable relief" under § 1132(a)(3)(B).[9] It is clear that the comprehensive provisions of ERISA were intended by Congress to be the exclusive remedy for beneficiaries under ERISA-authorized plans.[10] In light of that history, we cannot conclude that Congress intended to authorize any form of relief other than what was expressly granted. "Other appropriate equitable relief"

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[9]See n.4, supra.

[10]In Dedeaux, involving only state law claims, the Court stated: "[T]he detailed provisions of § [1132(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA, 106 S.Ct. at 1556.

should be interpreted to mean what it says--declaratory or injunctive relief, not compensatory and punitive damages.

In Massachusetts Life Ins. Co. v. Russell,[11] a case holding that ERISA's § 1109(a)[12] breach of fiduciary duty provision provided no express or implied authority for an award of punitive damages to a beneficiary, the Court stated: "The six carefully integrated civil enforcement provisions found in § [1132(a)] of the

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[11] 473 U.S. 134, 105 S.Ct. 3085, ___ L.Ed.2d ___, (1985).

[12] 29 U.S.C. § 1109 provides:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

statute as finally enacted ... provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."[13]

In Russell, the Court concluded that Congress had created liability for breach of fiduciary duty only in favor of the plan, and not in favor of individual beneficiaries. Following an examination of the legislative history of ERISA, the Court declined to imply a private remedy in favor of plan beneficiaries.

While Russell was limited to remedies available under § 1132(a)(2) for violations of § 1109 and "expressly reserve[d] the question whether extra-contractual damages might be one form of 'other appropriate

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[13] Id. at 146, 105 S.Ct. 3093, ___ L.Ed.2d at ___.

relief' under § [1132(a)(3)],"[14] we conclude, as have the Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits,[15] that extra-contractual damages are unavailable under § 1132(a)(3). We give our transcontinental imprimatur to the Ninth Circuit's simple, appealing expression of that conclusion: "[I]t appears that Congress used the word 'equitable' [in § 1132(a)(3)] to mean what it usually means--injunctive or declaratory relief."[16]

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[14] Russell, 473 U.S. at 157, 105 S.Ct. at 3098, 87 L.Ed.2d at 113 (Brennan, Jr., concurring).

[15] Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986); Sommers Drug Stores Co., v. Corrigan Enterprises, 793 F.2d 1456 (5th Cir. 1986), cert. denied, 107 S.Ct. 884 (1987); Powell v. Chesapeake and Potomac Tel. Co., 780 F.2d 419 (4th Cir. 1985), cert. denied, 106 S.Ct. 2892 (1986); Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987) (punitive damages unavailable); Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618 (7th Cir. 1987).

[16] Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986).

II. EXHAUSTION OF PLAN REMEDIES

The District Court granted summary judgment for Metropolitan on Count II of Drinkwater's complaint[17] because Drinkwater failed to exhaust the administrative remedies provided by ERISA. ERISA requires employee benefit plans to provide any participant whose claim for benefits is denied with an opportunity for review by the fiduciary denying the claim.[18] All Metropolitan employees were provided with a "Statement of Rights under the Employee Retirement Income security Act." The statement informed participants of their right, as required by ERISA, to have their

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[17]Count II sought compensatory damages equal to the difference between benefits paid and benefits which allegedly should have been paid.

[18]29 U.S.C. § 1133(2).

"claim reviewed and reconsidered upon request."[19]

It is undisputed that Richard Drinkwater failed to utilize the review procedure provided by Metropolitan, saving his complaints for the litigation process rather than the review procedure. As ERISA fails expressly to provide for exhaustion of administrative remedies for statutory claims, Drinkwater asserts that this Court should not require exhaustion. In addition, he makes the accusation, unsupported by facts, that the review procedure provided by Metropolitan was a meaningless exercise, requiring Metropolitan to adjudicate "the legal consequences of its own fraud and breach of contract," and that there was "not the slightest possibility that the plan administrator could be

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[19]See Record, p. 131.

objective, unbiased and act in the best interest of the beneficiary" in reviewing Drinkwater's claim.

Drinkwater does not dispute that exhaustion is required for claims which are purely contractual.[20] His argument, rather, is that his claim for past due benefits is based not on the contract but on the violation of his statutory rights under ERISA and is thus not subject to the exhaustion requirement. Metropolitan is correct in its counter argument, that this is a simple contract claim artfully dressed in statutory clothing. If we were to allow claimants to play this characterization game, then the exhaustion requirement would be rendered meaningless.

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[20] Barrowslough v. Kidder, Peabody & Co., 752 F.2d 923 (3rd Cir. 1985); Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980).

Traditional exhaustion principles do include an exception for instances "when resort to the administrative route is futile or the remedy inadequate."[21] For this exception to apply, however, those in pursuit must show that the administrative route is futile or the remedy inadequate. A blanket assertion, unsupported by any facts, is insufficient to call this exception into play.

It is undisputed that Metropolitan's plan provided the required review procedure. Metropolitan contends that this procedure, if employed, would produce a full and fair review and an appropriate disposition of Drinkwater's claim. Drinkwater produced no evidence to show, or

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[21] Amato v. Bernard, 618 F.2d 559, 568 (9th Cir. 1980), quoting Winterberger v. General Teamsters Auto Truck Drivers and Helpers Local Union 162, 558 F.2d at 925 (9th Cir. 1977).

even raise the point, that resort to this review would have been futile, or that the administrative remedy sought would have been inadequate.

III. STATE-BASED PENDENT CLAIM--PREEMPTION?

Judith Drinkwater's complaint addresses the emotional distress she suffered because her husband was forced to return to work at a time when doing so posed a serious threat to his physical and emotional health. Despite the claim being a distinct state law claim, Metropolitan succeeded below in convincing the trial court that it arose from the terms of the employee benefit plans, and thus the claim is preempted by ERISA.

The problem with Metropolitan's interpretation is that Judith Drinkwater is not a person for whom ERISA provides a remedy. Under Dedeaux, supra, a state law claim is

preempted if it relates to an employee benefit plan. Mrs. Drinkwater's claim does not relate to her husband's ERISA plan. She simply claims that Metropolitan's outrageous conduct in pressuring her husband to return to work foreseeably caused her emotional distress. The fact that the means Metropolitan used to pressure Richard Drinkwater--threatening to withhold his disability benefits--related to an ERISA plan does not mean that Judith Drinkwater's claim so relates. In order to recover for emotional distress, Judith Drinkwater need not show anything at all about ERISA or the Plan. Summary judgment on preemption grounds was therefore inappropriate.

Although her emotional distress claim is not preempted, we nonetheless affirm the grant of summary judgment in Metropolitan's favor on this claim. Under Massachusetts

law, the direct object of outrageous conduct may recover without proof of physical injury.[22] However, one who is not the direct object of tortious conduct can recover for emotional distress only if he or she has also suffered "substantial physical injury."[23] As the complaint alleges, and the record reflects, only that Richard Drinkwater was the target of the outrageous conduct, and neither alleges, nor does the record reflect, any physical injury to Judith Drinkwater, she has failed to state a claim.

CONCLUSION

The District Court correctly dismissed Count I as ERISA provides the exclusive

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[22] Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976); Dziokonski, 399 Mass. 249, 380 N.E.2d 1295 (1978)

[23] Dziokonski, supra; Agis, supra.

vehicle for redress of disputes over employee benefit plans. Extra-contractual damages are unauthorized by ERISA. Count II was likewise correctly dismissed for failure to exhaust administrative remedies. Count III, dealing solely with pendent state law claims, was incorrectly dismissed on preemption grounds. We affirm Count III as Judith Drinkwater has failed to state a claim upon which relief can be granted.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD DRINKWATER and JUDITH DRINKWATER, Plaintiffs, v. METROPOLITAN LIFE INSURANCE CO., Defendant.	CIVIL ACTION NO. 85-4468-Y

ORDER

YOUNG, D. J. June 1, 1987

The plaintiffs, Richard and Judith Drinkwater (the "Drinkwaters"), brought this action against Metropolitan Life Insurance Company ("Metropolitan") alleging a violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 et seq. The Drinkwaters' amended complaint is in three counts.

Counts I and II allege that Metropolitan breached its fiduciary duty to Mr. Drinkwater under the relevant employee benefit plans. Mr. Drinkwater claims extra-contractual damages of $5,000,000.00 in Count I and $250,000.00 in Count II. He also claims $95,000.00 for past-due benefits in Count II. Count III alleges that Mrs. Drinkwater suffered emotional distress due to the intentional outrageous conduct of Metropolitan. Metropolitan moves for summary judgment on all three counts.

Following oral arguments and the parties' submissions in this case, the Supreme Court decided Pilot Life Insurance Co. v. Dedeaux, 107 S.Ct. 1549 (1987) and Metropolitan Life Insurance Co. v. Taylor, 107 S.Ct. 1542 (1987). On the basis of that authority wherein the Supreme Court noted the broad preemptive effect of ERISA

and its careful balancing directed "exclusive" remedies for improper processing of plan benefits, this Court grants Metropolitan summary judgment on the extra-contractual claims for damages in Counts I and II and on the claim for intentional infliction of emotional distress in Count III.

This leaves only the claim for past-due benefits in Count II, upon which the Court also rules in favor of Metropolitan.

Claims for benefits due under a benefit plan are generally required to first satisfy exhaustion of administrative remedy principles. See, e.g., Mason v. Continental Group, Inc., 763 F.2d 559 (9th Cir.) (1980); DePina v. General Dynamics Corp., No. 85-3887-Y, slip op. (D. Mass. March 6, 1987). While courts have recognized exceptions to the exhaustion requirement, see, e.g., DePina, No. 85-3887-Y,

slip op. at 5-6 (applying futility exception), none is applicable here. Therefore, Metropolitan's motion for summary judgment on all three counts is GRANTED. Judgment shall enter for Metropolitan.

WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD DRINKWATER and JUDITH DRINKWATER, Plaintiffs, v. METROPOLITAN LIFE INSURANCE CO., Defendant.	CIVIL ACTION NO. 85-4468-Y

JUDGMENT

YOUNG, D. J. June 2, 1987

In accordance with the Court's order of June 2, 1987, granting Defendant's motion for summary judgment on Counts I, II, and III, it is hereby ORDERED:

Judgment for the Defendant

WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

29 USCS § 1104. FIDUCIARY DUTIES

(a)(1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [5 USCS § 5108; 18 USCS §§ 664, prec. 1101, 1027, 1954; 29 USCS §§ 301-309, 441, 1001-1003, 1021-1031, 1051-1061, 1081-1086, 1101-1114, 1131-1144].

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversification requirement of paragraph ((1)(C) and the

prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

(b) Except as authorized by the secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877.)

29 USCS § 1132. CIVIL ENFORCEMENT

(a) A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) t0 enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a)

of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [part 2--29 USCS §§ 1051-1061; part 3--29 USCS §§ 1081-1086] (relating to participation, vesting, and funding), only if

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or

refusal, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, or grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) and shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USCS §§ 1101-1114]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 [29 USCS § 1106] by a party

in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954 [26 USCS § 4975(f)(4)]); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code [26 USCS § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USCS § 4975(e)(1)].

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code [28 USCS § 518(a)]), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 5, 88 Stat. 891.)

29 USCS § 1140. INTERFERENCE WITH RIGHTS PROTECTED UNDER ACT

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act [29 USCS §§ 301-309], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act [29 USCS §§ 301-309]. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act [29 USCS §§ 301-309]. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 5, § 510, 88 State. 895.)

CERTIFICATE OF SERVICE

I, Paul G. Holian, hereby certify that I have this 15th day of August, 1988, caused to have served the enclosed PETITION OF WRIT OF CERTIORARI by mailing (3) copies thereof to William J. Toppeta, Esq., James M. Lenaghan, Esq., David J. Larkin, Jr., Esq., One Madison Avenue, New York, New York 10010.

Paul G. Holian

John Wall